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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KESSLER WYATT, JR.,

Defendant and Appellant.

B229547

(Los Angeles County
Super. Ct. No. BA316885)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Kathleen Kennedy, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Pamela C. Hamanaka, Assistant Attorney General, Roberta L. Davis and Marc
A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Kessler Wyatt, Jr., appeals from the judgment entered following his convictions by jury on 14 counts of filing a false tax return (Rev. & Tax. Code, § 19705, subd. (a)(2)¹; counts 1, 4-13, & 17-19), two counts of tax warrant fraud (Rev. & Tax. Code, § 19721, subd. (a)(1)²; counts 20 & 23), and grand theft of personal property exceeding \$400 in value (Pen. Code, § 487, subd. (a); count 32). The court sentenced appellant to prison for three years. We affirm the judgment.

FACTUAL SUMMARY

1. People's Evidence.

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following. Teresa Herrera, a criminal investigator for the Employment Development Department (EDD) of the State of California (State), testified employers were required on a quarterly basis to report to the EDD their employees' wages, to report state income taxes withheld by the employer (hereafter, withholding),³ and to pay said withholding. Employers were also required to complete and file quarterly with the EDD a "Quarterly Wages and Withholding Report," (DE6) to comply with the reporting requirements, and were further required to submit the

¹ Revenue and Taxation Code section 19705, subdivision (a)(2), states, in pertinent part: "(a) Any person who does any of the following shall be guilty of a felony . . . : [¶] . . . [¶] (2) Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the Personal Income Tax Law or the Corporation Tax Law, of a return, affidavit, claim, or other document, that is fraudulent or is false as to any material matter, whether or not that falsity or fraud is with the knowledge or consent of the person authorized or required to present that return, affidavit, claim, or document."

² Revenue and Taxation Code section 19721, subdivision (a)(1), states: "(a) Any person who, with intent to defraud, does any of the following is liable for a penalty of not more than ten thousand dollars (\$10,000): [¶] (1) Willfully utters, passes, negotiates, or procures a state-issued income tax refund warrant generated through the filing of a return knowing that the recipient is not entitled to the refund."

³ Unless otherwise indicated, the term "withholding" refers to state income tax withholding.

withholding payment with the DE6. Employers were also required to file annually with the EDD an Annual Reconciliation Statement (ARS) which reflected the total wages and withholding for the tax year.

Franchise Tax Board (FTB) Supervising Special Agent Gema Gonzalez, an investigator in this case, testified the EDD was responsible for reporting and collecting withholding. An income tax return (return)⁴ was filed with the FTB. When a return was filed with the FTB, its system compared the withholding reported on the return with the withholding reflected in the EDD's system. If the amounts matched, the FTB would issue the taxpayer a refund for an alleged credit, whether or not withholding in fact had been paid by the employer.

a. Appellant's Businesses' Filings with the EDD.

In April 2004, Gonzalez executed a search warrant at the Los Angeles office, on Wilshire, of one of appellant's businesses (Wilshire office). Appellant was present and told Gonzalez the following seven businesses were appellant's businesses: Sitestars,⁵ Administrative Executive Search (Administrative), Personnel Recruiting Consultants (Personnel), CA Investments (CAI), Easy Employment (Easy), PRC, and Ote. Appellant told Gonzalez that appellant was responsible for preparing the DE6's and sending in the withholding payments as to these businesses. FTB Special Agent John Kang, an investigator in this case, testified Webgold was another of appellant's businesses.

Personnel filed an ARS (People's exh. No. 2⁶) for tax year 2001. It reflects total taxes due, including \$135,048 in withholding, and reflects \$1,335,742 in wages.

⁴ Unless otherwise indicated, subsequent references to a return(s) are to a California individual income tax return(s).

⁵ The record reflects that sometimes a business is referred to by different but substantially similar names. For example, there is no dispute Sitestars was referred to as Site Stars, LLC. We refer to each such business by one name only.

⁶ Subsequent references to exhibits are to People's exhibits by their numbers.

Personnel also filed an ARS (exh. 3) for tax year 2002. It reflects total taxes due, including \$42,120 in withholding, and reflects \$324,000 in wages.

Sitestars filed multiple DE6's⁷ (exh. 4) for various quarters during the tax years 2001 and 2002, and an ARS (exh. 5) for tax year 2002. The ARS reflects total taxes due, including \$109,763 in withholding, and reflects \$731,750 in wages.

Administrative filed multiple DE6's (exhs. 7, 8 & 9) for various quarters during tax year 2000. Administrative filed an ARS (exh. 10) for tax year 2000. It reflects total taxes due, including \$79,162 in withholding, and reflects \$850,108 in wages.

Administrative also filed multiple DE6's (exh. 6) for the quarter ending in March 2001. Herrera determined from Administrative's records that it made some payments to the EDD, but Administrative had an outstanding tax liability of \$201,761.

"PRC Recruits [¶] Corky Kessler" (Recruits) filed a DE6 (exh. 11) for a quarter during tax year 2002. Recruits also filed an ARS (exh. 12) for tax year 2002. The ARS reflects total taxes due, including \$23,900 in withholding, and reflects \$171,740 in wages.

CAI filed multiple DE6's (exh. 13, 14 & 15) for various quarters during tax year 2002. CAI also filed an ARS (exh. 16) for tax year 2002. The ARS reflects total taxes due, including \$175,584 in withholding, and reflects \$1,276,960 in wages.

Easy filed a DE6 (exh. 17) for a quarter ending in December 1999. Easy also filed an ARS (exh. 18) for tax year 1999. The ARS reflects total taxes due, including \$71,085 in withholding, and reflects \$1,138,478 in wages. Herrera reviewed every account associated with this case. After reviewing the records of the above six businesses of appellant, i.e., Personnel, Sitestars, Administrative, Recruits, CAI, and Easy (doing business as "On the Edge"), Herrera determined that none except Administrative paid withholding in any tax year.

⁷ Subsequent references to a business filing a DE6 are to the business, as employer, filing with the EDD a DE6 listing a below discussed alleged employee(s).

Herrera opined at trial that fraud had been committed. Her opinion was based on what she had observed, including exhibits 1 through 18, and was based on the fact the businesses had paid no money to the EDD.⁸ During cross-examination, Herrera testified she was assigned to this case because “the wages were inflated.”

Kang reviewed income tax returns filed by the above six businesses except Easy. He discerned a pattern, i.e., the business returns reflected very small incomes but very large wage expenses and other very large expenses. This pattern was consistent year after year for the business returns.

b. *Fraudulent Returns (Counts 1, 4 Through 13, and 17 Through 19).*

(1) *Background.*

Gonzalez testified that during the April 2004 search of the Wilshire office, appellant told Gonzalez that appellant used several names, i.e., Kessler Wyatt, Eric Kessler, Corky Kessler,⁹ and Otis Surrey. Appellant also used his uncle’s name. Appellant used different birth dates and social security numbers.

After Gonzalez executed the search warrant, she reviewed all recovered returns. They were on the computer seized from the Wilshire office. Income and withholding on the returns recovered from the office matched income and withholding reported to the EDD. The highest tax rate for personal income tax in California was 9.3 percent, but Gonzalez noticed the withholding rates on the returns were high, and greater than 9.3 percent. When Gonzalez reviewed the returns, she noticed a pattern. As to each return, reported wages were offset by alleged business losses, deductions, and/or losses from subchapter S corporations or limited partnerships, with the result taxable income was

⁸ The EDD expected employers to make payments when filing the DE6, but if that did not happen the employer had an opportunity to pay the balance when the ARS was filed. If the account was not current when the ARS was filed, the EDD sent to the employer a letter notifying the employer of its obligation. A lien would follow if the employer did not make payment.

⁹ The record sometimes reflects the name Corkey Kessler.

eliminated. Moreover, since the returns reported withholding and there was no taxable income, the result was the FTB had to issue a refund to the taxpayer.

Gonzalez testified taxpayers anticipating a loss could reduce their withholding since they knew they would not have a tax liability at the end of the year. In the present case, all of the returns reported very large losses or deductions which eliminated most or all of the taxable income. None of the taxpayers pertaining to the above discussed tax returns reduced their withholding in anticipation of losses.¹⁰

Kang testified he reviewed the records recovered from the Wilshire office as a result of the execution of the search warrant. They included individual folders for the returns admitted into evidence at trial. Kang did not find in those folders any documents which supported any claimed wage amount. Kang searched for ledgers, cancelled checks, payroll stubs, and/or employment agreements reflecting wages paid to any of the people referred to in the returns reviewed during trial. Kang found no such documentary evidence of wages. The W-2's relating to this case were found in appellant's computer. Kang discovered information indicating appellant had prepared some of his employees' returns.

To summarize the below, the People presented evidence as to counts 1, 4 through 13, and 17 through 19, that appellant violated Revenue and Taxation Code section 19705, subdivision (a)(2) in connection with fraudulent returns filed for six persons, i.e., Carl J. Anthony (count 1), Ernest Hoffman (counts 4-6), Frederick Johnson (counts 7-9), Darnell

¹⁰ Appellant was jointly tried with several codefendants. None of the codefendants are parties to this appeal. Codefendant Garnica claimed an interest deduction on one of her returns but Garnica told Gonzalez that Garnica was not entitled to the deduction. Garnica said she did not purposefully claim the deduction but appellant claimed it. Gonzalez had the impression Garnica had relied on appellant to prepare Garnica's returns.

Williams (counts 10-12), appellant (count 13), and Katherine Garnica (counts 17-19).¹¹ Copies of all said returns were found during the search of the Wilshire office.

(2) Count 1: Carl J. Anthony's 2002 Return.

In 1998, a court sentenced Carl J. Anthony to state prison for 28 years, i.e., at all times herein mentioned Anthony was in prison. Sitestars filed a DE6 (exh. 4) which reflected \$7,200 in withholding as to Anthony for the tax quarter ending September 30, 2002. The DE6 was purportedly signed by Corky Kessler.¹² Sitestars also filed a DE6 reflecting \$11,700 in withholding as to Anthony for the tax quarter ending December 31, 2002. The DE6 was purportedly signed by Kessler. The total of the above two amounts is \$18,900.

A return (exh. 32) filed for Anthony for tax year 2002, reflects \$18,900 in withholding by Sitestars. The return also reflects \$126,000 in wages from Sitestars, a \$98,331 loss from CAI, and a \$18,269 refund request. Anthony purportedly signed and filed the return, which indicated it was self-prepared. The State issued to Anthony a \$18,269 refund warrant (exh. 33) for tax year 2002.¹³ The warrant purports to bear Anthony's endorsement with directions to deposit the warrant in a specified bank account.

During the search of the Wilshire office, Gonzalez recovered a file pertaining to Anthony. It contained, inter alia, Anthony's above return, the refund warrant, letters Anthony sent from prison, and a bank statement for the above mentioned bank account. The account was in the name of Corkey Kessler.

¹¹ Hoffman, Johnson, Williams, Garnica, and Donna Goldring were additional codefendants.

¹² Appellant does not expressly dispute on appeal that a document purportedly signed by a person was signed by that person. The jury was free, of course, to reach a different conclusion as to the authenticity of a purported signature by Anthony.

¹³ Concerning this, Gonzalez testified this matter resulted in a total refund of about \$65,835. Exhibit 19, discussed below, appears to reflect this amount was comprised of federal and state refunds.

According to Gonzalez, some of the payroll reports bore other people's signatures, including the purported signature of Anthony. Gonzalez asked appellant about a payroll report bearing Anthony's name. Appellant initially did not say much other than that Anthony was unavailable. After Gonzalez repeatedly asked what that meant, appellant replied Anthony was in prison. Appellant told Gonzalez that appellant had signed Anthony's names to the payroll reports. Anthony did not work at appellant's office but appellant claimed Anthony did referrals.

Kang reviewed various documents seized from the Wilshire office. Kang testified "there was no indication of any [wages] or any payments being made to . . . [Anthony] who is in prison." Kang observed correspondence from Anthony to appellant. There were no references to work-related matters in the correspondence.

Exhibits 19, 21, and 22, are spreadsheets. Each reflects entries of \$18,900 in withholding for Anthony. Exhibit 20, another spreadsheet, reflects for Anthony a \$18,269 refund, separated into two amounts, i.e., \$8,269 for "Corky [state income tax]" and \$10,000 for "mom." Gonzalez testified she found a return pertaining to Anthony. It reflected a business which appeared to have his initials,¹⁴ but appellant told Gonzalez that the business was appellant's business.

(3) *Count 4: Ernest Hoffman's 2000 Return.*

A return (exh. 36) filed for Ernest Hoffman¹⁵ for tax year 2000, reflects \$12,333 in withholding by Administrative. The return also reflects \$90,000 in wages from Administrative, a \$74,850 loss from "Service-Consulting," and a \$12,211 refund request. The State issued to Hoffman a \$9,623 refund warrant (exh. 37) for tax year 2000. The warrant purports to bear Hoffman's endorsement to Personnel and the subsequent endorsement of Corkey Kessler.

¹⁴ We note Anthony's name is Carl Anthony and one of the businesses which appellant said was his was CA Investments. During Kang's testimony, he referred to "CA Investments, which is Carl Anthony."

¹⁵ Hoffman's first name is sometimes referred to in the record as Ertis.

(4) Count 5: Hoffman's 2001 Return.

Personnel filed multiple DE6's (exh. 1) reflecting a total of \$14,155 in withholding as to Hoffman for tax year 2001. A return (exh. 38) filed for Hoffman for that tax year reflects \$14,155 in withholding by Personnel. The return also reflects \$140,000 in wages from Personnel and a refund request of \$5,906. The State issued to Hoffman a \$5,906 refund warrant (exh. 39) for tax year 2001.

(5) Count 6: Hoffman's 2002 Return.

Personnel filed a DE6 (exh. 1) reflecting \$14,400 in withholding as to Hoffman for tax year 2002. A return (exh. 40) filed for Hoffman for that tax year reflects \$4,680 in withholding by Personnel. The return also reflects \$36,000 in wages from Personnel and a refund request of \$4,431. The State issued to Hoffman a \$4,183 refund warrant (exh. 41) for tax year 2002. Exhibits 19, 21, and 22, each reflect entries for Hoffman of \$36,000 in wages and \$4,680 in withholding. Exhibit 20, another spreadsheet, reflects a refund of \$4,431 for Hoffman.

(6) Count 7: Frederick Johnson's 2000 Return.

Administrative filed a DE6 (exh. 7) reflecting \$12,333 in withholding as to Frederick Johnson for tax year 2000. A return (exh. 50) filed for Johnson for that tax year reflects \$12,333 in withholding by Administrative. The return also reflects \$90,000 in wages from Administrative, a \$74,698 loss from "Service-Consulting" at Sybarite Productions (Sybarite), and a refund request of \$12,213. On March 19, 2001, the State issued a \$12,213 refund warrant (exh. 51) to Johnson for tax year 2000. (This is the refund warrant at issue in count 20.) The warrant purports to bear the endorsement of Johnson and the subsequent endorsement of Corky Kessler.

(7) Count 8: Johnson's 2001 Return.

Personnel filed multiple DE6's (exh. 1) reflecting a total of \$14,335 in withholding as to Johnson for tax year 2001. A return (exh. 52) filed for Johnson for that tax year reflects \$14,335 in withholding by Personnel. The return also reflects \$140,000 in wages from Personnel, a \$90,723 loss from Sybarite, and a \$11,956 refund request.

The return indicated Johnson was the proprietor of Sybarite. The State issued to Johnson a \$11,956 refund warrant (exh. 53). The warrant purports to bear the endorsement of Johnson. The warrant was negotiated at a check cashing business, and the business's information card (exh. 54) for Johnson listed appellant as a reference.

(8) Count 9: Johnson's 2002 Return.

Personnel filed a DE6 (exh. 1) reflecting \$14,440 in withholding as to Johnson for tax year 2002. CAI filed multiple DE6's (exhs. 13-15) reflecting a total of \$15,900 in withholding as to Johnson for that tax year. A return (exh. 56) filed for Johnson for that tax year reflects \$20,580 in withholding. The return also reflects \$36,000 in wages from Personnel, \$106,000 in wages from CAI, a \$85,415 loss from Sybarite, and a \$17,874 refund request. According to Kang and as reflected in exhibit 31 (discussed below) which he prepared, the State issued to Johnson a refund in the amount of \$17,874.

(9) Count 10: Darnell Williams's 2000 Return.

Administrative filed a DE6 (exh. 7) reflecting \$8,330 in withholding as to Darnell Williams for tax year 2000. A return (exh. 43) filed for Williams for that tax year reflects \$8,330 in withholding by Administrative. The return also reflects \$90,000 in wages from Administrative, a \$6,542 loss from Webgold, and a \$7,906 refund request. On February 8, 2001, the State issued to Williams a \$7,906 refund warrant (exh. 44) for tax year 2000. (This is the refund warrant at issue in count 23.) The warrant purports to bear the endorsement of Williams, endorsing same to "Professional [*sic*] Recruiting Consultant," and the subsequent endorsement of Corky A. Kessler.

(10) Count 11: Williams's 2001 Return.

Personnel filed multiple DE6's (exh. 1) reflecting a total of about \$11,819 in withholding as to Williams for tax year 2001. A return (exh. 45) filed for Williams for that tax year reflects \$11,819 in withholding by Personnel. The return also reflects \$130,000 in wages from Personnel, a \$56,450 loss from Webgold, and a \$10,118 refund request. The State issued to Williams a \$10,118 refund warrant (exh. 46) for tax year 2001. The warrant purports to bear the endorsement of Williams.

(11) *Count 12: Williams's 2002 Return.*

Personnel filed a DE6 (exh. 1) reflecting \$12,999 in withholding as to Williams for the tax quarter ending in March 2002. Sitestars filed multiple DE6's (exh. 4) reflecting a total of \$18,450 in withholding for tax year 2002. Personnel's DE6 reflected \$32,500 in wages and Sitestars's multiple DE6's reflected \$123,000 in wages.

A return (exh. 47) filed for Williams for tax year 2002, reflects \$22,675 in withholding. The return also reflects wages totaling \$155,500, i.e., \$32,500 from Personnel and \$123,000 from Sitestars. The return also reflects a \$77,625 loss from Webgold and a \$20,579 refund request. The State issued to Williams a \$20,579 refund warrant (exh. 48) for tax year 2002.

Exhibits 19, 21, and 22, spreadsheets, each reflect entries for Williams of \$22,675 in withholding and \$155,500 in wages. Exhibit 20, another spreadsheet, reflects a \$20,579 refund for Williams, consisting of \$15,448 for "Corky [state income tax]" plus \$5,131.

(12) *Count 13: Appellant's 2001 Return.*

Personnel filed multiple DE6's (exh. 1) reflecting \$12,646 in withholding as to appellant for tax year 2001. A return (exh. 66) filed for appellant for tax year 2001 reflects \$12,646 in withholding. The return also reflects \$1,602,399 in wages (including \$130,000 from Personnel), a loss of \$1,780,825 from various businesses including Sitestars, Personnel, Professional Recruiting Consultants, and PRC Recruits, and a \$12,646 refund request. The State issued to appellant a \$12,646 refund warrant (exh. 67) for tax year 2001. The warrant purports to be endorsed by Corky A. Kessler.

Gonzalez testified as follows concerning appellant's return. If a person had earned \$130,000, and had expected no tax liability, the person would be expected to ask the person's employer to reduce withholding and would be expected to have little, if any, withholding. A person might increase withholding so the person would not have to pay a large tax bill. However, appellant's return reflected very high withholding, even though it had not been paid to the State and the return reflected there was no tax liability.

Gonzalez also testified returns filed in appellant's name were recovered from appellant's office. Appellant told Gonzalez that appellant prepared those returns. Appellant said he knew the withholding he was claiming on the W-2 in the "return" had not been paid, but also said he had to report the income and withholding. Gonzalez confronted appellant with the fact he had received a refund based on "this return where the withholding had not been paid," and Gonzalez asked appellant if appellant had received a refund for "withholdings that you didn't send in." After appellant replied yes, Gonzalez asked if appellant saw anything wrong with that, and appellant replied " 'It's just a bookkeeping thing,' " it did not matter whether it was paid, and he was entitled to it.

Gonzalez explained the monies were never paid to EDD, and appellant was claiming withholding for amounts that allegedly had been paid. Appellant responded, " 'Yeah, but you can't hold an employee responsible.' " Gonzalez responded that that was true but appellant was the employer. Gonzalez also said, " 'You prepared the payroll returns; you prepared the W-2's and you prepared your own return. And you claim withholding on your return for that' – 'you also claim on your W-2 that you did not send in.' " Appellant kept insisting, " 'Well it is just a bookkeeping thing. I know what you are saying, and it may not quite be what it is, but it is a bookkeeping thing[.]'"

(13) *Count 17: Garnica's 2000 Return.*

Administrative filed a DE6 (exh. 8) reflecting \$1,129 in withholding as to Garnica for the tax quarter ending in September 2000. Administrative filed another DE6 (exh. 9) reflecting \$1,988 in withholding for the tax quarter ending in June 2000.¹⁶ A return (exh. 23) filed for Garnica for tax year 2000 reflects \$8,663 in withholding. The return reflects total wages of \$113,844, which, according to the related W-2 (exh. 24), consists of \$97,677 from Administrative and \$16,167 from Easy. The return also reflects a refund

¹⁶ Easy filed a DE6 (exh. 17) reflecting \$10,565 in withholding for the tax quarter ending in December 1999.

request of \$8,776. According to Kang and the spreadsheet (exh. 31) he prepared, the State issued to Garnica a \$8,776 refund warrant.

(14) *Count 18: Garnica's 2001 Return.*

Personnel filed multiple DE6's (exh. 1) reflecting a total of \$13,373 in withholding for tax year 2001. The DE6's also reflect \$156,000 in wages. A return (exh. 26) filed for Garnica for tax year 2001 reflects \$13,373 in withholding. It also reflects \$156,000 in wages, \$53,225 as adjusted gross income based on the federal adjusted gross income,¹⁷ and a refund request of \$10,622. A document (exh. 27) filed with the FTB which appears to summarize Garnica's 2001 federal tax return reflects a loss from Administrative (as a partnership or Subchapter S corporation) of \$68,726, plus a business loss of \$34,049 from "Recruiting Consultants."¹⁸ Gonzalez testified the State issued Garnica a \$10,622 refund warrant.

(15) *Count 19: Garnica's 2002 Return.*

CAI filed multiple DE6's (exhs. 13-15) reflecting as to Garnica a total of \$17,250 in withholding for tax year 2002. They also reflected \$115,000 in wages. Personnel filed another DE6 (exh. 1) reflecting \$18,000 in withholding for the tax quarter ending in March 2002. This second DE6 reflected \$45,000 in wages. A return (exh. 28) filed for Garnica for tax year 2002 reflects \$23,100 in withholding. It also reflects \$160,000 in wages, \$64,993 as adjusted gross income based on the federal adjusted gross income,¹⁹ and a \$20,643 refund request. A federal tax return filed for Garnica for tax year 2002 reflects a loss from PRC Recruits (as a partnership or Subchapter S corporation) of \$72,265, a business loss of \$32,962 from "Recruiting Consultan" (*sic*), and other income of \$10,220.²⁰ Gonzalez testified the State issued Garnica a refund of \$20,643. Garnica

¹⁷ The difference between these two amounts is \$102,775.

¹⁸ The sum of these two amounts is \$102,775.

¹⁹ The difference between these two amounts is \$95,007.

²⁰ The sum of \$72,265 and \$32,962, less \$10,220, is \$95,007.

denied to Gonzalez that Garnica was a partner in PRC Recruits. Gonzalez testified PRC Recruits was another “Kessler company.” Copies of all of the returns at issue in the above counts were recovered from the Wilshire office during the search.

c. Fraudulent Refund Warrants (Counts 20 & 23).

As mentioned, count 7 pertained to Frederick Johnson’s 2000 return. The previously recited facts pertaining to that count are incorporated by reference here. As indicated, on March 19, 2001, the State issued a \$12,213 refund warrant (exh. 51) to Johnson. It purports to bear his endorsement and the subsequent endorsement of Corky A. Kessler. That refund warrant is the subject of count 20.

As mentioned, count 10 pertained to Williams’s 2000 return. The previously recited facts pertaining to that count are incorporated by reference here. As indicated, on February 8, 2001, the State issued a \$7,906 refund warrant to Williams. It purports to bear his endorsement of the check to “Professional [*sic*] Recruiting Consultant” and the subsequent endorsement of Corky A. Kessler. That refund warrant is the subject of count 23.

d. Grand Theft of Personal Property (Count 32 & Exhibit 31).

To summarize the below, the People presented evidence as to count 32 that appellant committed grand theft of personal property in the amount of \$581,142, when he took refunds in that amount which the State issued in connection with the returns at issue in counts 1, 4 through 13, and 17 through 19, as well as in connection with other returns.

Kang testified as follows. He reviewed the contents of boxes seized during the search of the Wilshire office. They contained files related to returns, and contained “very organized individual files, in relations to all these people that were obtaining the refunds.” The boxes contained a separate file for each individual for whom returns were submitted, and files for the six businesses except Easy.

Kang obtained corresponding returns from the State, and determined the returns in the boxes were copies of returns that had been filed with the FTB. The amounts matched, including the refund amounts. Kang compiled a list of the various returns which were the

subject of “these refunds that were issued, based on [his] analysis of those six companies, and all those people with very minimal taxable income.” Exhibit 31 was the document he prepared and, according to Kang, the returns of the 27 persons listed on that exhibit were suspect. Appellant controlled six companies, Kang reviewed checks drawn against the bank accounts of those companies, and he determined the companies did not issue any checks to most of the 27 individuals listed on Exhibit 31.

Exhibit 31 is a spreadsheet summarizing returns filed, and refunds paid, for tax years 1999 through 2002, in this case. The spreadsheet reflects a total of \$581,142 paid in refunds to 27 persons. This includes a total of \$196,027 paid in refunds as to the alleged employees the returns of whom are at issue in counts 1, 4 through 13, and 17 through 19.

e. Exhibits 19 Through 22, and Related Returns.

During the search of the Wilshire office, Gonzalez found financial records of appellant’s different businesses, including spreadsheets, i.e., exhibits 19 through 22. She testified one such spreadsheet listed federal and state withholding for all prepared returns, and appellant’s “cut of those withholdings and the refunds he was going to get.” Exhibit 19 was a table with 14 columns and 25 rows described below. The first two columns were entitled “SS#” and “Name.” Below these columns are 24 rows of apparent social security numbers, and apparent names of individuals, respectively. The exhibit contains additional columns entitled: (1) year-to-date gross earnings, (2) federal withholding (“FIT,” i.e., federal income tax), (3) state withholding (“SIT,” i.e., state income tax), (4) the total (federal and state) withholding, (5) “95% of w/h [¶] Total Approx Refunds” (i.e., refunds which were 95% of the total withholding), (6) “Actual FIT Refunds,” (7) “Actual SIT Refunds,” (8) “Total Refunds,” (9) “Corky,” (10) “Cut,” and (11) “Other.” There are 24 rows of dollar amounts in each column, with exceptions, then a row at the bottom reflecting totals. Exhibits 20 through 22 reflect similar entries.

Gonzalez found in the Wilshire office returns for each of the 24 individuals listed on exhibit 19 for the various years, amounts, and refunds specified on that exhibit. Some

returns bore the name Vicky Johnson. Appellant told Gonzales that appellant had forged Vicky Johnson's signature.

During cross-examination, appellant's counsel asked Gonzalez if exhibits 19 through 22 were found in appellant's "actual" office. Gonzalez replied "[t]hey were in an office that we believe was Karen Wilson's office." Gonzalez later testified the four exhibits were in Wilson's office. Gonzalez was present when the search was conducted.

The following colloquy occurred without objection during appellant's cross-examination of Gonzalez: "Q But the actual hard copies [of exhibits 19 through 22] were found in Karen Wilson's desk, correct? [¶] A In her office, is my understanding. [¶] Q Where in her office? [¶] A At the time those were found, I was interviewing [appellant]. I later learned that they were found in her office. I believe that they were under her desk. [¶] Q And Karen Wilson was the bookkeeper, correct? [¶] A Yes, that's what [appellant] explained to me." Gonzalez was told copies of the exhibits were found on a computer, but she did not know on which computer they were found.

Gonzalez opined at trial that the returns listed in exhibit 19 were part of a fraudulent scheme. Her opinion was based on exhibit 19 and the fact Gonzalez had confirmed with the EDD that a substantial amount of the withholding had not been paid.

2. Defense Evidence.

In defense, Kang testified he never searched the residence of appellant or the codefendants. Kang understood appellant lived in a hotel. Kang testified there were some legitimate employees, "but there [are] other illegitimate claims here." Appellant presented no other defense witnesses. Appellant introduced documentary evidence of bank transactions involving Administrative, and other evidence that another of appellant's businesses had clients.

ISSUES

Appellant claims (1) exhibits 19 through 22 were inadmissible hearsay and (2) there is insufficient evidence supporting his convictions.

DISCUSSION

1. Exhibits 19 Through 22 Were Admissible Nonhearsay.

a. Pertinent Facts.

We have set forth in our Factual Summary a description of the nature and contents of exhibits 19 through 22. During redirect examination of Kang, the prosecutor asked whether exhibit 19 appeared to have aggregations of information for various tax returns and refunds. Kang replied yes. Codefendant Garnica then belatedly objected on foundation and hearsay grounds, and the court overruled the objections.

The prosecutor then asked if it appeared that whoever prepared “this chart” was keeping track of “all these various tax returns.” Kang replied yes. Garnica then belatedly objected on foundation and speculation grounds. Appellant belatedly objected on speculation grounds. The court overruled the objections. The prosecutor then asked if it appeared the individual was keeping track, on a single spreadsheet, of “all the refunds that would be expected to be made against these tax returns.” Kang replied yes. Appellant’s counsel then belatedly posed the “same objection.” The court overruled it. The prosecutor asked if it appeared that whoever prepared the spreadsheet was keeping track of if, and when, particular tax refunds had been received. Appellant’s counsel then belatedly posed the “same objection” and the court sustained it.

At the conclusion of the People’s case-in-chief, the parties stipulated to the effect an FTB agent took to the FTB the items seized during the search of the Wilshire office. Later, the court asked if there were objections to exhibits 1 through 72. Appellant objected to exhibits 19 through 22, arguing as follows. No person testified that that person found exhibits 19 through 22. A person testified simply that the person believed those exhibits were found at the location. The stipulation established the FTB agent brought the seized items to the FTB, but there was insufficient proof as to who found the items and where they were found.

Garnica objected to exhibits 19 through 22, arguing the court had overruled her hearsay objection, and there was no evidence where “that item” was found. Garnica also argued it was unknown who created exhibits 19 through 22 and, if Wilson created them, they were hearsay.

The prosecutor argued Gonzalez testified the exhibits were seized during the execution of the search warrant. The prosecutor commented, “if it is found in Corky Kessler’s business location where the search warrant is, it is relevant, admissible evidence. . . . it appears it fits in as part of the scheme.”

Garnica’s counsel commented the exhibits might have been created by someone who was not in court “and it could have been found in her office.” Appellant’s counsel “add[ed]” that since Gonzalez had testified she did not participate in the search and she was conducting interviews, anything to which Gonzalez would testify concerning what was found, where something was found, etc., would be hearsay. The court overruled “the objection.” Appellant then indicated Gonzalez had testified the exhibits were found. Appellant argued that that testimony was hearsay, Gonzalez admitted she did not find the exhibits, and “it is all hearsay as to where it was found or . . . all of that.” Exhibits 19 through 22 were admitted into evidence.

b. *Analysis.*

Appellant claims exhibits 19 through 22 were inadmissible hearsay.²¹ We disagree. “ ‘Hearsay evidence’ is evidence of a statement that was made other than by a

²¹ As indicated above, appellant posed untimely objections to Kang’s redirect examination testimony concerning exhibit 19, and appellant did not, during that testimony, explicitly pose a hearsay objection to the admission into evidence of exhibits 19 through 22, or any of them. At the conclusion of the People’s case-in-chief, appellant posed objections to exhibits 19 through 22 which were essentially relevance objections and objections that Gonzalez’s testimony about the exhibits was hearsay, but appellant posed no hearsay objection to any exhibit itself. We assume without deciding that the issue of whether the exhibits were inadmissible hearsay is preserved for appellate review (see Evid. Code, § 353, subd. (a)).

witness while testifying at the hearing and that is offered to prove the truth of the matter stated.” (Evid. Code, § 1200, subd. (a).) Exhibit 19 did not contain random words and numerals. The contents of exhibit 19 implied statements that 24 named persons with specified social security numbers had, e.g., year to date gross earnings and total withholding in specified dollar amounts. The prosecutor argued exhibits 19 through 22 were seized from appellant’s business office during the execution of the search warrant; therefore, they were relevant, admissible evidence of the criminal scheme at issue in this case. The prosecutor did not expressly state he was offering the exhibits for their truth.

Whether or not the implied statements in exhibit 19 were offered for their truth, i.e., to prove said persons in fact existed and to prove the specified information pertaining to each was true, the implied statements were admissible as nonhearsay to prove that the preparer of the exhibit (and also appellant, who possessed it (see fn. 21, *ante*)) knew income and tax terminology, and knew how to correlate multiple alleged persons with alleged income and tax information. This included information indicating “Corky”--which happened to be one of appellant’s aliases--received some of the alleged refunds.

We agree with the prosecutor’s suggestion that this evidence of appellant’s knowledge was, in turn, admissible to prove (along with other evidence in this case) that, in the present case, appellant in fact correlated persons with false income and/or tax information, and received refunds as a result, i.e., appellant participated in a criminal scheme. Similar reasoning applies to exhibits 20 through 22. We believe the reasoning of cases concluding that “pay-owe sheets” in narcotics cases, and records in bookmaking cases, are admissible as nonhearsay circumstantial evidence to prove narcotics and

We note appellant does not challenge the relevance of exhibits 19 through 22. We also note there was substantial evidence appellant possessed them. They were found in appellant’s Wilshire office. Indeed, there was substantial evidence appellant’s Wilshire office was a suite in which Wilson had a smaller office. Exhibits 19 through 22 were found, not merely in appellant’s suite, but under Wilson’s desk, and appellant told Gonzalez that Wilson was the bookkeeper. A trier of fact reasonably could have concluded appellant jointly possessed the exhibits.

bookmaking offenses, respectively, is applicable here. (Cf. *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1219-1223, 1225-1226.) Exhibits 19 through 22 were not hearsay; instead, they were nonhearsay circumstantial evidence that appellant committed the crimes of which he was convicted.

Moreover, even if exhibit 19 were not admissible as nonhearsay circumstantial evidence, Kang testified in effect that exhibit 19 appeared to have aggregations of information for various returns and refunds, it appeared that whoever prepared the exhibit was keeping track of all of the returns, and it appeared the individual was using the exhibit to keep track of the expected refunds associated with the returns. Gonzalez opined at trial that the returns listed in exhibit 19 were part of a fraudulent scheme, and her opinion was based in part on that exhibit. An extrajudicial statement which serves as a basis for expert opinion is nonhearsay. (Cf. *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208-1210.) Exhibit 19 was a nonhearsay basis for expert opinion testimony concerning what that exhibit was and the fact it was part of a fraudulent scheme.

Even if exhibits 19 through 22 were hearsay, it does not follow they were inadmissible. Evidence Code section 1222, states, “Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court’s discretion as to the order of proof, subject to the admission of such evidence.”

As mentioned, exhibits 19 through 22 were found in appellant’s Wilshire business suite and under the desk of Wilson in her office, and appellant told Gonzalez that Wilson was the bookkeeper. A bookkeeper is “one who records the accounts or transactions of a business.” (Merriam-Webster’s Collegiate Dictionary (10th ed. 1995) page 131.) The trier of fact reasonably could have concluded from these facts that Wilson created those exhibits and was authorized by appellant to do so. We review the admission of evidence pursuant to a hearsay exception under an abuse of discretion standard. (*People v. Lawley*

(2002) 27 Cal.4th 102, 153.) Moreover, where, as here, the trial court overruled any hearsay objection by appellant, we review the trial court's ruling, not the court's reasoning. (Cf. *People v. Smith* (2005) 135 Cal.App.4th 914, 923.) Even if exhibits 19 through 22 were hearsay, they were admissible under Evidence Code section 1222.

Finally, even if exhibits 19 through 22 were inadmissible hearsay, it does not follow we must reverse the judgment. As to counts 1, 4 through 13, and 17 through 19 (which alleged violations of Revenue and Taxation Code section 19705, subdivision (a)(2)), count 1 involved Anthony's 2002 return; counts 4 through 6 involved Ernest Hoffman's 2000 through 2002 returns, respectively; counts 7 through 9 involved Frederick Johnson's 2000 through 2002 returns, respectively; counts 10 through 12 involved Darnell Williams's 2000 through 2002 returns, respectively; and count 13 involved appellant's 2001 return. On the other hand, it appears exhibits 19 through 22 pertain *only* to tax year 2002,²² and appellant's name was not listed on those exhibits in any event.

Accordingly, to the extent counts 1, 4 through 13, and 17 through 19, involved returns for a tax year(s) other than 2002, the admission into evidence of exhibits 19 through 22 was not prejudicial since those counts were proven by ample independent evidence pertaining to that tax year(s) other than 2002. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836.) Moreover, we have set forth in our Factual Summary when exhibits 19 through 22, or any of them, were pertinent evidence as to a count. That summary shows that all of the counts as to all tax years were proven by ample evidence independent of exhibits 19 through 22; therefore, the admission into evidence of those exhibits was not prejudicial as to any count.

Counts 20 and 23 involved violations of Revenue and Taxation Code section 19721, subdivision (a)(1) based on the issuance in 2001 of refund warrants to Frederick

²² See the Factual Summary pertaining to counts 1, 6, and 12, each of which pertains to a 2002 return. Said summary demonstrates that, as to each such count, information in exhibits 19 through 22 correlated with information in a 2002 return.

Johnson and Darnell Williams in connection with their respective 2000 returns; therefore, the admission into evidence of exhibits 19 through 22, which pertained to tax year 2002, was not prejudicial as to those counts. Count 32 was largely based on Kang's testimony and exhibit 31, not exhibits 19 through 22. Exhibit 31 summarized returns filed, and refunds paid, for tax years 1999 through 2002. The admission into evidence of exhibits 19 through 22 was not prejudicial as to count 32.

2. There Is Sufficient Evidence Supporting Appellant's Convictions.

Appellant claims there is insufficient evidence supporting his convictions. We disagree. Appellant argues there is insufficient evidence supporting his convictions on counts 1, 4 through 13, and 17 through 19. Each of those counts alleged a violation of Revenue and Taxation Code section 19705, subdivision (a)(2) (see fn. 1, *ante*).²³

However, without repeating in detail the evidence in this case, we note there was substantial evidence as follows. Appellant, through his businesses (including his six businesses of Personnel, Sitestars, Administrative, Recruits, CAI, and Easy) supplied DE6's, ARS's, and W-2's reflecting amounts for withholding for various alleged employees. Appellant told Gonzalez that appellant was responsible for preparing the DE6's and sending in the withholding payments as to these businesses. Nonetheless, none of the above six businesses, except Administrative, made any withholding payment in any tax year. Even Administrative had an outstanding tax liability of \$201,761.

In sum, appellant knew not merely that he virtually never had paid withholding but knew he virtually never had actually withheld state income tax from the alleged employees' wages. Appellant thus falsely represented in DE6's, ARS's, and W-2's that his businesses withheld state income tax from the alleged employees' wages. In turn, these falsely stated withholding amounts were also reflected on the filed returns of alleged employees, including those whose returns are at issue in counts 1, 4 through 13, and 17 through 19.

²³ The court, using a modified CALCRIM No. 2825, instructed on the elements of this offense.

In light of the above, we conclude there was sufficient evidence as to counts 1, 4 through 13, and 17 through 19, that appellant “[w]illfully aid[ed] or assist[ed] in, or procure[d], . . . the preparation or presentation under, or in connection with any matter arising under, the Personal Income Tax Law . . . of a return, . . . that is fraudulent or is false as to any material matter, whether or not that falsity or fraud is with the knowledge or consent of the person authorized or required to present that return” within the meaning of Revenue and Taxation Code section 19705, subdivision (a)(2).

The gravamen of appellant’s argument is “since there was no evidence that any of the individual claims of wages and losses were false, there is no support for the inference that there was a fraudulent scheme afoot.” We disagree. First, there was substantial evidence that individual claims of wages, if not losses, were false.²⁴

Second, even if the claims of wages and losses on the returns were true, there was support for an inference a fraudulent scheme was afoot. The claimed losses and/or deductions had the effect of negating claimed wages with the result alleged employees claimed they had no taxable income. Appellant falsely represented in DE6’s, ARS’s, and W-2’s that his businesses withheld state income tax from alleged employees’ wages. As a result, these falsely stated withholding amounts were reflected on the filed returns of alleged employees. Even if the alleged employees truthfully claimed on their returns that

²⁴ Herrera testified she was assigned to this case because “the wages were inflated.” Kang reviewed checks drawn against the bank accounts of appellant’s six businesses and determined they did not issue any checks to most of the 27 persons listed on exhibit 31. Kang reviewed individual folders for returns admitted into evidence at trial. The folders were recovered from the Wilshire office. Kang did not find in the folders any documents supporting any claimed wage amount. He searched for ledgers, cancelled checks, payroll stubs, and/or employment agreements reflecting wages paid to any of the people referred to in the returns reviewed during trial, and he found no such documents. Kang reviewed various documents seized from the Wilshire office and testified to the effect they did not indicate that wages or payments had been made to Anthony, who was in prison. Correspondence from Anthony to appellant did not discuss work-related matters. Garnica told Gonzalez that appellant erroneously claimed a deduction on Garnica’s return.

said employees had no taxable income, nonetheless, their returns, as far as appellant was concerned, *falsely and fraudulently claimed withholding*, and those false and fraudulent withholding claims resulted in refunds.²⁵

Appellant argues there is insufficient evidence supporting his convictions on counts 20 and 23, each of which alleged a violation of Revenue and Taxation Code section 19721, subdivision (a)(1) (see fn. 2, *ante*). Appellant maintains “Since the evidence of filing a false return is insufficient, the evidence of a violation of [the above subdivision] must, necessarily, also be insufficient.” Since we conclude there is sufficient evidence supporting appellant’s convictions for violations of Revenue and Taxation Code section 19705, subdivision (a)(2), appellant’s current argument that there is insufficient evidence supporting his convictions for violations of Revenue and Taxation Code section 19721, subdivision (a)(1) (counts 20 & 23) fails.

Appellant finally argues there is insufficient evidence as to his conviction for grand theft of personal property exceeding \$400 in value (count 32) because “[o]nce again, as in the counts of violating Revenue and Taxation Code sections 19705 and 19721, if there was no deception, there was no crime.” In light of our above analysis, we conclude there was a deception; therefore, appellant’s argument fails.

²⁵ Appellant was entitled to exercise his right to present no defense evidence and to rest on the state of the evidence. However, appellant presented defense evidence and, once appellant did so, the jury was entitled to consider it. In the present case, the jury reasonably could have concluded the defense evidence was weak on various issues, including whether appellant, through his businesses, falsely and fraudulently reported wages, and especially whether he falsely and fraudulently reported withholding. The jury was entitled to consider this when evaluating all of the evidence and, here, convicting appellant. We presume, of course, the jury understood and followed the court’s instruction (per CALCRIM No. 355) that appellant had an absolute constitutional right not to testify, and that the jury was not to consider or discuss the fact he did not testify.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.